ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

Sales of Lands by Administrators and Guardians, as against Infant Heirs.—Infants are bound by proceedings by an administrator to sell real estate, although they are not nominally made parties to the proceedings, provided such proceedings are in other respects regular: *Gibson* vs. *Roll.*

A proceeding by an administrator to sell the real estate of his decedent, is adverse to the infants, and he must follow the statute in his petition, and give proper notice; if he does these the sale will be good: *Id.*

If the proceedings of a guardian to sell the real estate of infants have not been regular and in conformity to law, they must have an opportunity to correct the errors. But such proceedings are not adverse to the interests of the infants, and if they have been regular the infant will be bound by them: *Id.*

The case of Ex parte Sturms et al., 25 Ill. R. 390, overruled in part: *Id.*

Where the notice of a sale of real estate by an administrator, was in general terms thus: "All persons interested are requested to appear and show cause, if any they have, why such decree should not be granted:" *Held*, that this was a sufficient notice to the infant heirs, although not named therein: *Id.*

Where the Track of a Railroad is by Statute made Personal Property, it may be taken up and sold for Taxes.—The act of Illinois, of February 14, 1855, amendatory of the revenue laws, which directs, that the track or superstructure of a railroad shall be denominated "fixed and stationary personal property," was intended to create a species of personal property not before known to the law. For non-payment of taxes upon this property, the collector may levy upon the rails and remove them from the track, for the purpose of selling them: *Maus* vs. *The Logansport, Peoria, and Burlington Railroad et al.*

This act has reference only to the collection of the revenue, and does not change the character of such property for other purposes: *Id.*

Section 14 of the amendatory act of 1853, which provides, that real property shall be liable for taxes on personal property, and *vice versa*, has no application to this "fixed and stationary personal property." Such

[1] By E. Peck, Reporter.

property must bear its own burden of taxation; it cannot be shifted upon the bed of the road lying underneath, as insisted by defendants: *Id.*

It is within the province of the legislature to provide, that property, which is attached to the freehold, so as to become a part of it by the common law, may be regarded as personal property for all purposes, or for any special purpose. Of this character is the act of February 14, 1855, which directs, that for the purposes of collecting the revenue, the track and superstructure of a railroad, together with the improvements at stations, shall be denominated personal property: *Id.*

Maliciously Suing out an Injunction.—This action was *case* for maliciously suing out an injunction. At the time of procuring the injunction an injunction bond was executed and filed according to the statute of Illinois:—

The Court held that the action would not lie.

After alluding to, and disapproving of, Cox *vs.* Taylor, 10 B. Monroe 17, sustaining such an action, the Court say:—

BREESE, J.—We hold the remedy on the bond given on obtaining the injunction, is all the remedy to which the injured party can resort. It is designed by the statute to cover all damages the party enjoined can possibly sustain, and it is in the power of the judge or officer granting the writ, to require a bond in a penalty sufficient to cover all conscionable damages. This bond is a high security which the law requires the complainant in a bill for an injunction to execute, to indemnify the defendant, in case the injunction shall be dissolved: *Gorton* vs. *Brown*.[1]

NEW YORK COURT OF APPEALS.[2]

Canals.—The canal board, upon reversing or modifying an award of the canal appraisers, must state the grounds of reversal or modification in their resolution. The statute (ch. 752 of 1849, § 4) is imperative, not merely directory: *The People ex rel. Barnes* vs. *Gardner*.

The offering by one of the canal commissioners, at a meeting of the canal board, of a resolution, in writing, that an appeal be reheard, is an application in writing for such rehearing: *Id.*

Trover—Proof of Ownership—Pleading.—In an action, under the Code, for damages for the conversion of a bill of lading, the plaintiff is

[1] This case will appear in the 27th volume of Illinois Reports.

[2] From E. P. Smith, Esq., State Reporter.

entitled to recover upon proof of the detention of four tables, assumed to be of equal value, to *some* one of which the plaintiff had title, though the particular one had in no manner been designated, except upon the notion that the defendant must have taken some three of them before removing the fourth, and thus selected those three as his own: *Clark* vs. *Griffith et al.*

Certiorari to Justice.—The return of a justice of the peace to a certiorari, under the Code, must contain all the testimony received by him: *Orcutt* vs. *Cahill et al.*

Where a justice's return sets forth evidence in detail, it is to be considered as stating the whole testimony, unless the contrary distinctly appears: *Id.*

Executor—Administration for Collection—Discretion of Surrogate.—The statute (ch. 460 of 1837, § 22), upon affidavit of the intention to file objections against the granting of letters testamentary to one of several executors, requires the surrogate to suspend the grant of letters as well to any of the executors not objected to as to those who are: *McGregor* vs. *Buel.*

The issuing of special letters of administration to a collector is discretionary with the surrogate, and though his refusal to appoint such collector be put on the ground of his having (erroneously) issued letters testamentary to an executor, this does not render his discretion the subject of review, on appeal. The remedy, if any, is by mandamus: *Id.*

Corporation organized in fraud of Creditors.—A creditor in good faith of a manufacturing corporation which was organized, and its business conducted, for the purpose of defrauding the creditors of its president, has no priority of claim to property in the possession of such corporation over a creditor of the president: *Booth* vs. *Bunce et al.*

The purchaser of goods of the corporation under execution against its president, for his private debt, gets a good title as against a subsequent execution against the corporation: *Id.*

Breach of Promise—Evidence in mitigation of Damages.—In an action for breach of promise, evidence, drawn out by the plaintiff, of declarations by the defendant, tending to prove that his failure to marry the plaintiff proceeded from no want of respect or attachment to her, is proper for the consideration of the jury, in mitigation of damages: *Johnson* vs. *Jenkins.*

The defendant in such an action is entitled to prove the truth of such

declarations, and to show that his mother, a woman in infirm health, was strenuously opposed to the match: *Id.*

Railroad—Forfeiture of Charter for non-user of Road.—A railroad corporation which has completed its road between the termini named in its charter or articles, forfeits its franchise by abandoning or ceasing to operate a part of the route: *People* vs. *The Albany and Vermont R. R. Co.*

It seems, that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure. Per DENIO, SUTHERLAND, ALLEN, and SMITH, Js.: *Id.*

The remedy, however, is not an action in equity, on behalf of the public, to enforce a specific performance, but by mandamus or indictment, or, at the election of the State, by proceeding to annul the corporation: *Id.*

Annuity—Personal Liability for.—A will gave all the testator's real and personal estate, and declared that the donee was to pay all the testator's debts and a certain annuity. The acceptance of the gift creates a personal liability upon which an action can be maintained at law without any express promise: *Gridley* vs. *Gridley.*

Plank Roads—Liability of Subscribers.—Under the general plank road act (ch. 210 of 1847), those only who subscribe the articles of association are entitled to stock or compellable to pay for the same: *Poughkeepsie and Salt Point Plank Road Co.* vs. *Griffin.*

The preliminary subscription and other steps prior to the signing of the articles of association are provisional and inchoate, creating no fixed right and imposing no obligation on the parties: *Id.*

It seems that one otherwise liable as a corporator would not be discharged by reason of the legislature's having extended the time for laying plank and permitting the corporation, in the mean time, to act and collect tolls as a turnpike company. Per DENIO, J.: *Id.*

Bills and Notes—Evidence of Title.—The ownership of a promissory note by the plaintiff is sufficiently shown by the averment of its making, indorsement, and delivery to him before maturity, for a valuable consideration, though coupled with the statement that it was, "by the Bank of Commerce, in the city of New York, which then held the same," presented for payment at another bank in that city, where it was payable: *Farmers' and Mechanics' Bank, &c.*, vs. *Wadsworth et al.*

The statement in respect to the Bank of Commerce imports only a holding as the plaintiff's agent for collection, and not ownership: *Id.*

Railroad—Change of Cars—Passenger to use ordinary Care and Attention—Evidence of Regulations of Company.—To corroborate the conductor on a railroad in respect to the time of the arrival of his train at a station, evidence is admissible that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time-table regulating the running, stoppage, &c., of such train may also be proved: *Barker et al.* vs. *The New York Central Railroad Company.*

So, also, evidence is admissible of the regulations of the corporation, and of the custom of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given station: *Id.*

A passenger was pointed by an agent of the carrier to a train then standing in his sight as one which would convey him to Lyons. That train, after running one hundred and fifty miles, deflected to a branch road not passing through Lyons, but was followed an hour afterwards by another train which passed through Lyons. *Held*, that the passenger was in fault for being miscarried, if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveller of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train: *Id.*

If the traveller, without fault on his part, passed the point of divergence, but was apprised of his error and requested to take a return train on which he would have been carried free, in season to have reached a train which would have carried him to Lyons without delay, his refusal to do so, and persisting in remaining upon the wrong train, renders him a trespasser, liable to ejection from the cars: *Id.*

Factors' Act—What sufficient documentary Evidence of Title to protect Pledgee.—The Factors' Act (ch. 179 of 1830) protects one who makes advances upon the faith of the documentary evidence of title furnished by a warehouse-keeper's receipt of imported goods procured by a factor by his being intrusted with an invoice of the goods, although the invoice showed that the goods belonged to the shipper: *Cartwright et al.* vs. *Wilmerding et al.*

The factor's making a warehouse entry at the custom-house, taking a warehouseman's receipt and transferring it with authority to make the withdrawal entry at the custom-house, enable the pledgee to reduce the property to his possession as effectually as a custom-house permit, and are equivalent thereto as a security under the act: *Id.*

The pledgee, acting upon the faith of documents which, according to

the course of business, were sufficient to transfer the property in goods warehoused subject to duties, and which contain nothing to indicate any title out of the pledgor, is not bound to inspect the warehousing entry which is retained at the custom-house, and in the course of business would not be in possession of the owner of goods which he had himself imported: *Id.*

It is unnecessary that the principal should have intrusted his factor with the identical evidence of title on the faith of which he procures a loan. Intrusting him with the primary document is equivalent to intrusting him with all others which, in the ordinary usage of trade, grow out of it: *Id.*

That the pledge, and the delivery of the documentary muniments thereof, are separated by some interval of time, is no otherwise important than as it may raise a suspicion that the giving security was an afterthought: *Id.*

Goods in warehouse, subject to be withdrawn at pleasure by a factor on discharging the lien of government for duties, may be regarded as in his possession, so as to support a pledge thereof made by him, independent of the provisions of the act in regard to documentary evidences of title: *Id.*

Railroad—Liability for Negligence—Gratuitous Passenger.—A contract between a railroad corporation and a gratuitous passenger by which the former is exempted from liability under any circumstances of the negligence of its agents for any injury to the passenger is not against law or public policy and is valid: *Wells* vs. *The New York Central R. R. Co.*

It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of negligence, in respect to the liability of common carriers, discarded as illusory and impracticable: *Id.*

SUPREME COURT OF NEW YORK.

Highways—Dedication to the Public—Laying out—Effect of Repairing.—A way may be dedicated by the owner of land, as a public highway, by an immediate act of dedication, and it will become a legal highway whenever it is laid out as such by the constituted authorities, who are charged with the duty of laying out highways: *Trustees of the Village of Jordan* vs. *Otis.*

In the State of New York the responsibility of making highways is devolved upon the commissioners of highways; and a road opened by an

individual and used by the public less than twenty years, is not a highway, within the meaning of the highway acts, until it has been laid out as such by the commissioners of highways, or other public authorities upon whom the duties of commissioners of highways are devolved by law: *Id.*

Repairs made upon such a road, by an overseer of highways, do not constitute a valid acceptance, for want of authority in him to bind the town: *Id.*

Practice—Contempts.—Where a party seeks, not to review a decision made at a special term, on the merits, but to have it set aside or revoked, on the ground of irregularity, his remedy is not by *appeal*, to reverse the order, but by *motion* to set it aside for irregularity, or to declare it void as a nullity: *Pitt* vs. *Davison.*

On proceedings against a party as for a contempt, by an order to show cause, personal service of the order, or personal appearance in court in compliance with its terms, is indispensable. Service of the order upon the *attorney* of the party is not sufficient to give the court jurisdiction of the person: *Id.*

If the party cannot be served with an order to show cause, the proper course is to apply for an attachment against him, to compel his attendance before the court; and if necessary, for *alias* and *pluries* writs: *Id.*

Whenever a party appears, on an order to show cause, or when he is brought before the court on an attachment, for a contempt, interrogatories must be filed; except where the misconduct has been committed in the presence of the court, and where the party has disobeyed a subpœna, or a rule or order for the payment of money: *Id.*

Carriers of Goods—Rule of Damages.—Where goods have been shipped in the name of a party not the real owner, and have afterwards been seized or taken by authority of law, from the possession of the carrier, on process against the true owner, the carrier may, in an action brought by the shipper, to recover the value of the goods, give evidence of these facts, and that the goods so shipped belong to the party against whom the process was issued, whereon the goods were taken: *Van Winkle* vs. *The United States Mail Steamship Company.*

Such a case is an exception to the general rule that the bailee or carrier cannot be heard to deny the title of the bailor or shipper: *Id.*

The rule of damages, for the non-delivery of goods so seized or taken, is their value at the place of delivery: *Id.*

Savings Bank—Setting up Title in a third Person.—In an action against a savings bank, by the assignee of a depositor, to recover the sum deposited, the defendant cannot set up as a defence, that the deposit is the proceeds of securities belonging to third parties, which the depositor obtained and fraudulently converted, and that such parties have notified the defendant of those facts and that they claim the deposit as their property: *Lund* vs. *The Seamen's Bank for Savings.*

A debtor cannot be permitted, by plea or answer, to volunteer the protection of the claims of those with whom he has had no dealings, to defeat his liability for the performance of his contracts: *Id.*

Trustees—Commissions and Expenses.—A trustee, who holds the title to property by conveyance from a debtor or borrower of money, in trust to secure a creditor or lender, where no compensation is provided in the conveyance, and no service is performed, or liability incurred, by the trustee, and no request to act as trustee is made by the borrower, can have no recourse to the borrower or debtor, by action, for commissions or compensation, if the original demand so secured has been voluntarily paid by the debtor, without any resort to the security: *Wetmore* vs. *Brown and others.*

In case the trustee has advertised the property for sale, and incurred expenses and rendered services in respect thereto, by the direction of the creditor, when nothing was due or payable by the terms of the conveyance, the trustee must look to the party who gave him his instructions, for the payment of such services and expenses, and not to the borrower: *Id.*

Pleading—Compromise of a doubtful Claim.—A complaint alleged that the plaintiffs having executed a mortgage, and the same having been foreclosed and the land sold to D. and the plaintiffs being about to apply to set aside the sale, on the ground of irregularity, the defendant proposed to purchase the property of D., and to pay to the plaintiffs $500, if they would refrain from making such application; that the proposition was accepted, and the defendant purchased the premises and paid the plaintiff a part of the $500 promised, leaving a part unpaid, for which the action was brought: *Held,* on demurrer, that the complaint was defective, in not alleging that there was some doubt or dispute as to the regularity or validity of the judgment in the foreclosure suit, upon which the defendants therein might have founded a proceeding to vacate it: *Dolcher and Wife* vs. *Fry.*

SUPREME COURT OF MICHIGAN.[1]

Mortgage—Redemption.—A bill was filed for the redemption of lands from a mortgage more than thirty years past due. The bill showed that the mortgagee and those claiming under him had claimed and disposed of the land as absolute owners for more than twenty years. *Held*, that under such circumstances the bill was demurrable unless it set forth such facts as established the mortgage as continuing in force and subject to redemption. A statement in the bill that the land had not for twenty years continuously been *occupied* adversely to the mortgagor, is not sufficient: *Reynolds* vs. *Green*.

Replevin—Bonâ fide Purchaser—Demand.—Where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand. And he may do this notwithstanding the property is in the hands of one who has bought in good faith, without notice of the title of the real owner: *Trud* vs. *Anderson*.

Attachment—Bonâ fide Purchaser—Recording Laws.—A deed, absolute in terms, was given to secure a debt; and the grantee gave back a written defeasance. A creditor of the grantee, having no knowledge of the defeasance (which was not recorded), attached the lands, and the defeasance then coming to his knowledge, filed a bill in chancery to have it declared void as to him, and the land declared subject to his lien. *Held*, 1st. That a mortgage interest in lands was not attachable: 2d. That the unrecorded defeasance was only void as to *bonâ fide* purchasers having no knowledge of it at the time of purchase: 3d. That an attaching creditor was not a *purchaser* until he had obtained judgment, caused the land to be sold, and bid it in: *Columbia Bank* vs. *Jacobs*.

Statutory Foreclosure of Mortgage.—To render the statutory foreclosure of a mortgage under the power of sale valid, where the premises consist of several parcels, the sale of each parcel must be made separately, and the deed must show that it was so made, and also the purchase price of each parcel. The statute requires this, and the proceeding being *ex parte* must comply strictly with the statute: *Lee* vs. *Mason*.

Guaranty of Collection of a Secured Demand.—Where one assigns a note and the mortgage which secures it, and indorses upon the note a

[1] From T. M. Cooley, Esq., State Reporter.